IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

* * *

NO. 79-793

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HOUSTON LIGHTING AND POWER COMPANY,
and
ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,
Petitioners

V.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents

* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* * *

Mark White, Attorney General of Texas, respectfully files this brief as *amicus curiae* in support of the Joint Petition of Houston Lighting and Power Company ("HLP") and Arizona Electric Power Cooperative, Inc. ("AEPC") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

I. INTEREST OF THE STATE OF TEXAS

For the past fifty years, the economy of the State of Texas has been heavily dependent upon the once cheap and abundant petroleum and natural gas readily available within its borders. However, in recent years Texas and the nation have become increasingly reliant on imported oil. The OPEC oil embargo in 1973, and the continuing energy crisis that followed it, made it clear that our nation's increasing reliance on imported oil cannot continue much longer. Congress has reacted to these new energy realities with a series of laws[1] confirming and promoting the national policy of promoting the maximum possible use of our relatively plentiful domestic fuels, such as coal, in preference to scarce and costly fuels such as imported petroleum and natural gas.

Because of Texas' long reliance on its own natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, a shift to increased coal use will be far more difficult and costly for Texas than for some other areas of the country. Nevertheless, Texas has fully supported the Congressional coal conversion programs and the national energy policy which they seek to implement. The Fuel Use Act, passed in 1978, is a key element in those programs. It generally prohibits

[1]*See*, e.g., the *Emergency Petroleum Allocation Act of 1973* (Pub. L. 93-511, 88 Stat. 1608); the *Federal Nonnuclear Energy Research and Development Act of 1974* (Pub. L. 93-477, 88 Stat. 1978); the *Energy Reorganization Act of 1974* (Pub. L. 94-438, 88 Stat. 1233); the *Energy Supply and Environmental Coordination Act of 1974* (Pub. L. 93-319, 88 Stat. 246); the *Energy Policy and Conservation Act* (Pub. L. 94-163, 89 Stat. 871); the *Energy Conservation and Production Act* (Pub. L. 94-385, 90 Stat. 1125); and *the Powerplant and Industrial Fuel Use Act* (Pub. L. 95-620, 92 Stat. 246) ("Fuel Use Act").

utilities and industries from using natural gas as a boiler fuel in new facilities. On December 17, 1975, the Railroad Commission of Texas promulgated an order known as "Gas Utilities Docket 600 -- in Re: Elimination of Natural Gas As a Boiler Fuel In Texas" ("Docket 600") which contained requirements analogous to the Fuel Use Act.[2] Docket 600 was in several respects more stringent than the Fuel Use Act.[3]

Texas' utilities and industries, including HLP, have undertaken to support and comply with these national programs by conversion to the use of coal. One would have expected Congress and the federal agencies to be united in their support of those coal conversion efforts. Instead the Interstate Commerce Commission (the "Commission"), has effectively penalized those efforts. In particular, the Commission's western coal transportation rate decisions such as those at issue here have approved extortionate freight rates on the transportation of coal from the upper midwest to Texas, on the ground that such traffic is a ready source of additional funds thought to be needed by the railroad industry. The circumstances which make Texas coal users a ready source of such funds are the OPEC price increases and governmental actions such as the Fuel Use Act, which together have largely eliminated inter-fuel competition as an effective constraint on coal transportation pricing.[4] Since the railroad industry has

[2]Subsequent to the passage of the Fuel Use Act in 1978 Docket 600 was repealed.

[3]For example, although the Fuel Use Act bans use of natural gas to fuel new generating units (§201), it provides exemptions from the prohibition (§§211-14) beyond any available under Docket 600.

[4]This is particularly true once a utility has signed a long-term coal purchase contract and has invested millions of dollars in coal-burning facilities. At that point it has no choice but to pay whatever it costs to transport the coal it is already committed to buy. Such a utility will think twice, however, before making investments

a monopoly over coal transportation in the West,[5] these circumstances mean that the railroad industry can now raise its rates on Western coal traffic to almost any level it pleases, thereby increasing its profits, without fear of causing existing traffic to stop moving. The Commission has in effect said that the railroad industry should be *permitted* to charge more on western coal traffic because it *can* charge more.

The very purpose of regulating the prices of monopolies such as railroads and public utilities, of course, is to prevent them from exercising their economic muscle to charge unreasonably high prices. In effect, the Commission has gone full circle on coal rates. Abandoning its role as guardian of the public interest, it now *encourages* the monopolistic pricing practices of the railroads it was created to control.

The Commission has virtually abdicated its regulatory responsibilities in the area of western coal rates. This has meant that the nation's energy policies have increased the economic leverage of the railroad industry. Thus, those policies have perversely resulted in extortionate coal freight rates being passed on to Texas citizens. We cannot allow this to continue.

Texas and its people and industries have undertaken

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requiring *additional* coal purchases, once it has been victimized by the railroads' rate-gouging. Other prospective coal receivers, not yet burned, will also be reluctant to convert. This is perhaps the most ominous of the adverse energy impacts flowing from ICC decisions which allow the railroads to exploit their monopoly power for short-run profits.

[5]Motor transport of coal is economically and environmentally impractical over long distances, and barge transport is not an alternative unless both mine and power plant are near navigable waterways. Moreover, virtually every coal mine in the West, and most power plants, are served by only one railroad, and thus there is not even any potential for competition *between* railroads.

to do their share toward the resolution of the nation's energy problems. They have recognized from the beginning that conversion of Texas utilities and industries to coal, in order to free petroleum and natural gas reserves for higher and better uses elsewhere, will entail substantial capital costs that will have to be borne by Texans. However, if those costs are to be compounded by the decisions of a federal agency bent on enriching the railroads, the inevitable economic consequence is that the use of domestic coal will be seriously hampered. If this happens the nation will be the loser.

II. REASONS FOR GRANTING THE WRIT

The substantive issue before this Court is whether the Commission erred in determining in the HLP and AEPC decisions (the "HLP Order" and the "AEPC Order", respectively) that coal transportation rates approved in those Orders are reasonable. This brief will focus on two generic complaints against the Commission's Orders:

1) that the Commission did not apply the correct legal principles in making its determinations; and

2) that the Commission's findings lack sufficient specificity.

Many issues have been raised by HLP and AEPC in regard to, among other things, the Commission's calculation of the costs involved in the instant movements. These claims are significant and merit this Court's close attention. However, the State of Texas will not in this brief address those detailed issues but rather will concentrate its discussion on an invidious practice in which the Commission has engaged in this case. That practice is the allowance and indeed support of an abuse by the railroads of their monopoly position in regard to the transportation of western coal. That transportation

monopoly is reinforced by the lack of viable options to the use of that energy source by HLP and AEPC and others similarly situated. That abuse consists of the requirement that the shippers of western coal subsidize the railroads' less profitable movements.

The State of Texas contends that the rates at issue are too high. The introductory portions of the brief have indicated the impact which coal transportation rates have on the national energy policy and on Texas specifically. It is not the position of the State of Texas that the railroads should not be allowed to operate the instant movements at a reasonable profit. That profit and the rate from which it is derived, however, must be no higher than a reasonable level.

A. SUBSIDIZATION OF COMPETITIVE ROUTES

The rate prescribed substantially exceeds the cost of transporting coal in the instant movements. There is little dispute in the record about that, although there is some dispute about the precise numbers. Even the Commission calculates that its rate in the HLP Order is "163% of variable costs and 121% of fully allocated costs."

There is, likewise, little dispute as to what this means. It means that HLP and AEPC and their consumers are being forced to subsidize the railroads on shipments of other commodities over which the railroads do not have a transportation monopoly.

At page 14 of the HLP Order the Commission summarizes one of the railroad's contentions in support of the rate as follows:

> Moreover respondents point out that much railroad traffic must move at rates below fully allocated cost because of competition. Therefore, if a railroad is to earn an overall return which covers its full costs, it must be allowed to set many rates well in excess of their full-cost level where competition, market conditions, and demand permit. For example, respondents point out that because wheat constitutes such a large portion of the Santa Fe's traffic and because rates on wheat are depressed and moving at little over variable cost because of truck competition, coal must contribute relatively more toward system-wide needs.

The rate granted constitutes and is intended to constitute such a subsidy paid by these shippers to support other less profitable movements.

The decision of the Commission to require such a subsidy is based on its construction of Section 205[6] of the *Railroad Revitalization and Regulatory Reform Act of 1976*, Pub. L. 94-210, 90 Stat. 31 (1976) (the "4 R Act"). In a rate case involving these railroads and a Texas utility but not dealing directly with the subsidy issue as currently presented, the Eighth Circuit declared that rates for rail services should be "structured to 'stand on their own wheels.' " *Burlington Northern, Inc. v. U.S.*, 555 F.2d 637, 647 (8th Cir. 1977). The Court specifically explained that rates for services should "stand on their own wheels" in the sense that consumers in one community should not be forced to subsidize consumers in another community, and consumers of one product should not be forced to subsidize consumers of another product. The Commission itself has held that "lack of adequate revenues from operations as a whole affords no reliable measure of the reasonableness of rates...on individual commodities," *Scott County Milling Co.*, 194

[6]Section 205 constituted an amendment to Section 15a(4) of the Interstate Commerce Act which is now codified as 49 U.S.C. 10704(a)(2).

I.C.C. 763, 765 (1933).[7] This position is reasonable, logical, and is in accord with the duty of the Commission to guard against abuse of monopoly power.

The Commission apparently feels that Section 10704(a)(2) alters that rule of law. It does not.[8] The intent of that statutory provision and the national policy of "Railroad Revitalization" evidenced by the 4 R Act is fully served if the rates at issue are set at a level which allows these railroads, when operated in an "honest, economical and efficient"[9] manner, to pay the costs properly attributable to the movement at issue and to receive a reasonable return to capital or profit on that movement.

The rates at issue were designed to exceed that level substantially. They were designed to constitute and do constitute subsidies to the railroads for traffic which allegedly moves at a lower level.

Even if the 4 R Act had been drafted so as to allow for the imposition of such a subsidy burden, it would be improper to impose that burden here. It is an elemental tenet of transportation law that the public interest must be a primary factor in the Commission's decisions on rate matters. In the words of this Court: "Rate structures are not designed merely to favor the revenues

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[7]This reference is cited by the Court of Appeals at page 31 of its opinion below. The court also cites *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592 (1949).

[8]The so-called "rule of ratemaking" which is the source of that rule of law is now codified as 49 U.S.C. 10701(a). It provides that "a rate (on a regulated service)...must be reasonable". Section 10704(a)(2), upon which reliance has been placed in regard to consideration of the revenue needs of the Railroads and to the imposition of such subsidy burdens does not amend that basic statutory provision.

[9]49 U.S.C. 10704(a)(2).

of producers and carriers. The Commission has the consumer interest to safeguard as well." *Ayrshire Collieries Corp. v. United States*, supra. The Commission has gone so far as to hold that the "public interest is the *first* consideration in determining the reasonableness of rates" (emphasis added). *Hansen Packing Co. v. Baltimore & Ohio Ry.*, ICC 75, 77 (1934).

It is difficult to conceive of an issue of greater public interest than the Nation's energy problems. Those problems, as discussed above, have been the focus of repeated congressional and administration concern and action throughout the 1970's. The Commission's decision reflects a complete disregard of those problems. There can be no question but that high freight rates will discourage increases in coal usage. The Commission itself recently so found:

> As rates vary, coal usage varies inversely...The changes in the consumption (real demand) for coal affect the demand for other fuels. (Significantly, the fuel that benefits from the major shifts in coal is residual oil; oil imports are projected...to offset the coal supply shortfalls induced by high coal freight rates.)"

Draft Environmental Impact Statement served October 19, 1979, *Ex Parte 347, Western Coal Investigation -- Guidelines for Railroad Rate Structure*, at Pate XIII.

Thus the approval of a rate which imposes such a subsidy obligation in these cases constitutes a blatant disregard of the public interest in conversion to the use of coal. Such a rate is not "reasonable" within the meaning of the Rule of Ratemaking (49 U.S.C. 10701(a)) and cannot be justified by reference to Section 10704(a)(2). Again, the State of Texas is not seeking a subsidy from other shippers for the movement of coal to Houston. It is, however, adamantly opposed to paying a subsidy.

B. ADEQUACY OF FINDINGS

The Commission concluded that a subsidy burden should be imposed upon both HLP and AEPC. The necessary consequence of this conclusion is that the national energy policy in regard to conversion to coal will be undermined. However, the Commission does not address this issue in its opinion. Neither does it address other issues relevant to the subsidy issue and thus relevant to the more general issue of the reasonableness of the rates.

Any challenge such as this to a Commission rate adjudication must recognize that the courts apply a deferential standard of review. As Mr. Justice Frankfurter observed nearly forty years ago, Congress has narrowly confined the scope of judicial participation in the ratemaking process:

> The process of ratemaking is essentially empiric. The stuff of the process is fluid and changing -- the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

Board of Trade of Kansas City v. United States, 314 U.S. 534, 536 (1942).[10]

Nevertheless, the Commission's discretion in determining the reasonableness of rates is not unbounded. Indeed the courts should not hesitate to reverse an agency decision which abuses that discretion

[10]See *A.T. & S.Fe. Ry. v. Wichita Board of Trade*, 421 U.S. 800, 806-807 (1973); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1942).

or fails to follow the mandates of law.

Under section 8(c)(A) of the Administrative Procedure Act (the "APA"), 5 U.S.C. 557(c)(A), the Commission is required to provide in all of its decisions:

> a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

As this Court has stated in interpreting the APA in another case arising under the Interstate Commerce Act:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (Citation omitted)

Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962).

The Commission's orders must contain more than ultimate conclusions. These orders must contain findings which adequately reveal that all of the relevant factors have been considered and that the agency's conclusion is at least rationally related to the evidence. *PEPCO v. United States*, 584 F.2d 1058, 1062 (D.C. Cir. 1978). In summary, there must be a reasoned analysis of all major issues in Commission rate cases. See *Nat'l. Assoc. of Food Chains v. I.C.C.*, 535 F.2d 1308, 1314-15 (D.C. Cir. 1976); *A.T. & S.Fe. Ry. Co. v. I.C.C.*, 588 F.2d 517, 519 (5th Cir. 1977). Otherwise, the discretion inherent in legislatively-delegated power can degenerate into unchecked administrative caprice. "It is not enough for an administrative agency to assert

'expertise' as a defense for all seasons." *ASG Industries Inc. v. United States*, 548 F.2d 147, 154 (6th Cir. 1977).

There is no mention, much less reasoned discussion in the Commission's HL&P Order of the impact which these egregious rates will have on our national energy policy. It cannot be contended that one of the most significant issues facing our nation today is not relevant to these proceedings. Indeed, Congress has *specifically* directed the ICC to address the effect of its decisions on energy policies. Section 382(c) of the Energy Policy and Conservation Act, P.L. 94-163, 89 Stat. 871, requires the Commission to

> include in any major regulatory action . . . a statement of the probable impact of such major regulatory action on the energy efficiency and energy conservation.[11]

The provision of the 4 R Act upon which the Commission relies for its supposed authority to require a subsidy to be paid is, as stated above, 49 U.S.C. 10704(a)(2). However, the Commission failed to include findings as to Section 10704(a)(2)'s operative provisions in the Orders. There is no finding that the revenues of these railroads, or any of them are not "adequate". There is no finding, even if revenues are deemed to be inadequate, that such inadequacy exists despite "honest, economical, and efficient management." There is no finding that the levels of debt, the repayment of which is sought to be assured, are "reasonable". In short, there is no basis stated for the implied conclusion that these railroads have inadequate revenues within the meaning

[11]It can scarcely be contended that the ICC decisions at issue here were not "major regulatory actions", in light of the millions of dollars that turned on them, and in light of their enormous impact on the nation's energy policies.

of that statute.[12]

The Commission offers two "proxy tests" at page 35 of the HLP Order which purport to show the impact of the revenue need factor on its decision. The "proxy tests" (a) are not explained in sufficient detail to allow their evaluation, and (b) are not given any identifiable weight in the decision making process.

The analysis of the Court of Appeals at page 30 of its opinion below points out graphically, although inadvertently, the defect in the Commission's reliance on revenue need in support of its decision to require a subsidy. That Court says:

> While it did not prescribe specific standards by which to determine the adequacy of revenue levels--deeming that effort inappropriate in view of the then-pending rulemaking directed to the question -- the Commission in both cases felt that consideration of overall revenues was nonetheless desirable in light of the strong congressional policy embodied in Section 10704(a)(2). The Commission emphasized the particular importance of this consideration in capital incentive rate proceedings, where the congressional purpose to encourage large-scale investment--with the concomitant need to raise capital--was especially acute. Thus, recovery of revenues in excess of fully allocated costs was justified in these cases. (Footnote Omitted.)

The foregoing embodies a logical fallacy. The existence of such a "congressional policy" does not imply the

[12]Even if such findings were present and supported by evidence the preceding section of this brief demonstrates that the 4 R Act would not allow the imposition of a subsidy requirement on HLP and AEPC, and, in any event, consideration of the National Energy Policy would bar its imposition here.

propriety of imposition of subsidy obligations on any shipper, much less on HLP or AEPC, and this is especially true in light of the complete absence of any findings on the existence of revenue needs; the extent of those needs, if any; or whether those needs, if any, exist despite "honest, economical and efficient management."[13]

At page 32 of its opinion, the Court of Appeals states:

> It is not a fatal flaw that some traffic is carried at rates above total cost; the revenues from such traffic when added to revenues from traffic that competition requires be carried at less than full cost (but with some contribution to fixed costs), yield adequate overall revenues.

This bold assertion is unsupported by any findings in the Commission's Order. Even if imposition of a subsidy obligation is under some circumstances permissible under the 4 R Act the Court is engaging in pure speculation when it makes the foregoing assertion.

This points to another fundamental defect in the Commission's decision-making process and its Orders. Although it is clear that a subsidy is being paid by HLP and AEPC, no one knows the amount of that subsidy or who the beneficiaries are. When such a subsidy is paid the railroad benefits directly but the shipper for whose business the railroad is competing also benefits from reduced shipping costs. Therefore, when the Commission imposes such a subsidy burden on HLP it is, in effect, taking money from HLP and its customers and giving that money not only to the railroads but also to the competitive shipper. However, one cannot

[13]The Court noted that in the AEPC Order, the Commission repeated the Railroads' argument regarding lower rates on competitive service. However, that recitation (a) does not constitute an adequate finding on the relevant issues, and (b) is inapplicable to HL&P.

determine from the HLP order how much subsidy is being paid or who, other than the railroads, is receiving the benefit of that money. If the Commission knows, it should disclose that information in its order; if it does not know then its order is not based on substantial evidence and is arbitrary and capricious.

As stated above, the 4 R Act does require that, in its rate determinations, the Commission "balance the needs of carriers, shippers and the public." Section 101(b)(1). One of those needs is the need to convert to the use of coal as a boiler fuel.[14] The Court of Appeals at page 34 of its opinion below recognizes the Commission's failure to address those issues when it says "while the Commission's decisions do not address the public interest explicitly, they reflect a permissible balancing of the pertinent interests." That Court's conclusion as to the propriety of the Commission's action is unfounded. Without explicit findings and explanation there is no way for a Court to determine whether a "permissible balancing" has occurred. This situation provides an excellent example of the need for careful and detailed consideration and explanation in the Commission's orders.

These rates were filed under the so-called Capital Incentive Rate provision of the 4 R Act (49 U.S.C. 10729). Where certain levels of capital expenditure are involved, it provides that expedited adjudicatory proceedings will apply and protects the resulting rate from reduction for five years, a substantial advantage to the railroads in these cases. The Court of Appeals in its opinion below (at page 26) makes the following statement in regard to judicial review of Commission action in Capital Incentive cases:

[14]The discussion herein of the public interest has concentrated on the national energy policy favoring coal conversion because of its immediate relation to the subject at issue and its pressing national importance, however, other public issues, e.g., inflation and balance of payments problems, will also be affected.

> The congressional interest in encouraging large-scale investments by minimizing regulatory uncertainty, coupled with sensitivity to the time pressure under which the Commission must operate in capital incentive proceedings, suggest that this standard of review be applied with *an extra dollop of deference.* (Emphasis added.)

That assertion is wholly without merit and cannot be allowed to stand unchallenged. If any change in the general standard of review and level of judicial deference is appropriate in cases under that section it is a change toward an increased level of vigilance by the courts. This is true because the accelerated time schedules impose an enormous burden on protestants attempting to present comprehensive evidence (most of which is in the hands of the railroads) on these complicated issues. The railroad instituting such a proceeding does not face this problem since it can simply wait to file the proceeding until its evidence is prepared. Further, the results of an erroneous ruling in these cases can be devasting since a Capital Incentive Rate, once established, is subject only to *upward* adjustment for a period of five years.

CONCLUSION

All of the foregoing are fundamental, substantial errors in the Commission's decision and decision making process which have operated to the detriment of Petitioners, the State of Texas, and the nation as a whole. This Court should grant the Joint Petition of HLP and AEPC for Writ of Certiorari and upon hearing thereof reverse the instant decisions of the Commission and the Court of Appeals.

In the event this Court is disinclined to grant certiorari in these cases at this time, the State of Texas requests that rather than denying HLP and AEPC's

petition, action be deferred until such time as the issues raised are addressed by this Court in another case. It appears that the issues involved in the Commission's regulation of rates on Western coal are destined to come before the Court. The number of disputes involving these same basic issues is large and growing. The amount of money which turns on the resolution of these issues is massive. The impact of these cases on the national interest is major.

The circumstances discussed at page 16, *et seq*, of the Joint Petition create a pressing need for review of this case either now or following review of some other case deemed by the Court more appropriate for its initial consideration. Therefore, the State of Texas joins in Petitioners' request that this Court not deny certiorari but rather defer action if the Court is unwilling to review these cases at this time.

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CERTIFICATE OF SERVICE

I, Carl E. Glaze, Assistant Attorney General of Texas, hereby certify that a true and correct copy of the foregoing Brief of the State of Texas has been served by placing same in the United States mail, postage prepaid, on this the 23rd day of January, 1980, addressed to the parties of record.

CARL E. GLAZE